Supreme Court, U.S.
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No. 00-216

IN THE

Supreme Court of the United States

WILLIAM G. MOORE, JR.,

Petitioner,

v.

JOSEPH B. VALDER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY FOR THE PETITIONER

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REPLY FOR PETITIONER

As the petition demonstrated, this case raises an important question concerning the application of the official immunity doctrine and, more generally, the willingness of the lower courts to provide private citizens with relief against government officials for violations of their constitutional rights. In addition, as the petition also demonstrated, this case presents an ideal vehicle because it presents these issues in a well-defined manner against the backdrop of substantial allegations of egregious official misconduct.

Far from undermining these demonstrations, the opposition's conclusory assertions and conspicuous silences make it abundantly clear that this Court should review the decision below. Indeed, because respondent fails to offer any serious response to the petition's showing that the decision below conflicts with this Court's holding in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), and with the principles established by this Court's official immunity decisions, summary reversal is warranted.

I. THIS CASE RAISES AN IMPORTANT AND WELL-DEFINED QUESTION WARRANTING THIS COURT'S REVIEW.

The petition showed (Pet. at 25-28) that this case warrants review because it presents a question concerning an inherently important subject that this Court has frequently addressed even in the absence of a conflict among the circuits, because it presents that question in a factually compelling context refined and focused through multiple (albeit somewhat conflicting) appellate opinions, and because the terse and arbitrary way in which the decision below answered the question casts doubts upon the willingness of courts of appeals to enforce announced limitations on the immunity of prosecutors.

Indeed, the opposition does not even dispute that this case involves substantial allegations of official misconduct. Instead,

respondent argues that this case is not a good vehicle because the district court dismissed petitioner's claim on the alternative ground that there was insufficient evidence of retaliatory motive. Opp. at 12-13. This argument suffers from three obvious flaws.

First, the district court's ruling plainly violates this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998). As respondent acknowledges, Opp. at 11 n.6, *Crawford-El* held that, when a plaintiff with a *Bivens* claim based upon unconstitutional motive survives an initial motion to dismiss, that plaintiff is entitled to some discovery before the evidence of unconstitutional motive can be challenged on summary judgment. *See* 523 U.S. at 598. In direct violation of this holding, the district court found insufficient evidence of motive without permitting any discovery. Pet. at 10, 24.

Second, even without discovery, petitioner assembled dramatic evidence of unconstitutional motive. Among other things, that evidence showed that petitioner had an acrimonious relationship with the United States Postal Service, that he publicly (and, even worse, successfully) attacked, before Congress and in the press, the Postal Service's decision to rely upon single-line optical scanners, and that as a result of the switch to multi-line scanners high-ranking Postal Service officials, including the postmaster general, were removed. Pet. at 4. The evidence also showed that, while the scanner controversy was brewing, postal inspectors launched an unwarranted and meritless criminal investigation marred by repeated and egregious misconduct, including the coercion of William Spartin and the disclosure of secret grand jury materials to the postmaster general who was fired as a result of the controversy. *Id.* at 4-7. Given this evidence, a reasonable jury could easily infer that postal inspectors retaliated against petitioner for the exercise of his First Amendment rights and that respondent joined in their vendetta.

In addition, as the petition indicated, discovery against the postal inspectors has uncovered several "smoking guns." Pet. at 25. For example, respondent received a memorandum from the postal inspectors stating that petitioner's company should be indicted because it "funded a media and political campaign to discredit USPS management and cause financial harm to USPS." Pet. App. 127a-30a. Another document lists petitioner's opposition to single-line scanners "via the media and Congress" as a detail of his supposed offense. *Id.* at 131a. Thus, petitioner's evidence of retaliatory intent is clearly sufficient.

Third, it makes no difference that respondent was partially motivated by personal ambition. Pet. at 5 n.1. As respondent acknowledges in his brief, in order to prove retaliatory prosecution a party need only show that the defendant was "motivated *at least in part* by a purpose to retaliate for or to deter" constitutionally protected conduct. Opp. at 7 (emphasis added; quotation omitted).

II. THE DECISION BELOW SHOULD BE SUMMARILY REVERSED.

Respondent also fails to show that plenary review of the decision below is necessary.

A. Respondent Has Not Reconciled the Decision Below with *Buckley*.

The opposition fails to offer any real challenge to the petition's demonstration that the decision below conflicts with this Court's holding in *Buckley*. In fact, respondent does not even directly address petitioner's primary argument that the decision below adopted the very theory rejected by this Court in *Buckley*. The petition showed that (a) in *Buckley* the Seventh Circuit held that prosecutors are absolutely immune from claims based upon injuries flowing from the initiation or prosecution of a case (Pet. at 12-13); (b) in the decision below the court of appeals held that prosecutors cannot be held liable

for causing a prosecution to be brought (*id.* at 14); and (c) these theories are "simply two sides of the same coin" (*id.*). Rather than disputing this reasoning, respondent attempts to brush past it by asserting that the petition "reflects a misunderstanding of . . . the decision of the court of appeals in this case" and that in fact the decision below dismissed petitioner's retaliatory prosecution claim because that claim "is 'predicated upon [the] decision to prosecute.'" Opp. at 6 (quoting Pet. App. 7a). This assertion is, however, belied by the text of the opinion below and the facts of this case.

In the first place, the passage quoted by respondent does not reflect the lower court's rationale for applying absolute immunity; it is part of the description of *petitioner's* argument against such immunity. Pet. App. 7a ("As he [petitioner] sees it, his retaliatory prosecution claim is not predicated upon Valder's decision to prosecute."). Even more importantly, in rejecting this argument the lower court stated:

> The problem for Moore is that we rejected this very argument in *Dellums v. Powell*, 660 F.2d 802, 805-07 (D.C. Cir. 1981) ("*Dellums II*"). A "prosecuting official," we ruled, *could not be "held liable for causing a prosecution to be brought*," despite the fact that *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976), extended only qualified immunity to prosecutors acting in an investigatory capacity.

Pet. App. 7a (emphasis added). Thus, the lower court's rationale was that prosecutors may not be held liable for causing a prosecution, not the more narrow rationale offered by respondent in his attempt to escape this Court's holding in *Buckley*.

Respondent also fails to reconcile the decision below with Justice Kennedy's opinion in *Buckley*. Although respondent asserts that this opinion is "significantly more tentative" than the petition suggests, Opp. at 9 n.5, he does not deny that in that opinion Justice Kennedy and the three other justices who

joined him recognized that, under *Buckley*, a prosecutor is not absolutely immune from a malicious prosecution claim based upon investigatory conduct. Instead, citing this Court's opinion in *Jones v. United States*, 526 U.S. 227 (1999), respondent asserts that Justice Kennedy's opinion is not a reliable guide to the majority's decision. Opp. at 9 n.5 (citing *Jones*, 526 U.S. at 249 n.10). In *Jones*, however, this Court simply observed that where a majority and a dissenting opinion conflict over the scope of the majority opinion, the majority's views control. *See* 526 U.S. at 249 n.10. As there is no such conflict here, Justice Kennedy's opinion remains persuasive authority. Indeed, one of the decisions cited by respondent relies upon it. *See Zahrey v. Coffey*, 221 F.3d 342, 356 (2d Cir. 2000).

B. Respondent Has Not Reconciled the Decision Below with the Principles of Official Immunity Formulated by this Court.

Respondent also fails to reconcile either his rationale or the rationale actually employed by the decision below with the principles of official immunity adopted by this Court.

1. Athough respondent does not dispute the petition's demonstration (Pet. at 17-18) that any absolute immunity claimed by him must be grounded in the common law in place at the time Section 1983 was enacted in 1871, he fails to offer any evidence of such a grounding.

Citing this Court's decisions in *Buckley* and *Imbler*, respondent asserts that the absolute immunity of prosecutors from suits for malicious prosecution was well settled at common law. Opp. at 10. As Justice Scalia has repeatedly admonished, however, "there was . . . no such thing as absolute prosecutorial immunity when § 1983 was enacted." *Kalina v. Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring); *Burns v. Reed*, 500 U.S. 478, 499 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part).

Accordingly, looking to the immunity accorded judges and grand jurors at common law, *Imbler* held "only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit." *Imbler*, 424 U.S. at 422-23 & n. 20, 431. Likewise, *Buckley* refused to extend prosecutorial immunity to "a prosecutor's fabrication of false evidence during the preliminary investigation of an unsolved crime" because there was no evidence of such immunity "at common law, either in 1871 or at any date before the enactment of § 1983." 509 U.S. at 275. Thus, neither *Imbler* nor *Buckley* offers the common-law predicate needed to justify application of absolute immunity here.

2. Respondent also fails to reconcile the decision below with the functional approach adopted by this Court's official immunity decisions. Although respondent denies that the decision below was based upon status, Opp. at 9-10, his denial is once again belied by the text of the decision. According to respondent, the decision "held that petitioner's allegations of non-immune investigatory misconduct do not make out a claim of retaliatory prosecution." *Id.* at 10. The decision did not, however, question whether petitioner properly pled the elements of retaliatory prosecution. Instead, it held that "[a] *prosecutorial official* . . . could not be held liable for causing a prosecution to be brought." Pet. App. 7a (quotation omitted; emphasis added). Moreover, the decision acknowledged that, under its rationale, "the only official who could not be held liable for malicious or retaliatory prosecution is the prosecutor." *Id.* at 7a n.2. Thus, contrary to respondent's protestations, the decision below is clearly based upon respondent's status as a prosecutor.

3. Respondent does not—and cannot—dispute that the decision below violates the principle that "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate, nor justifiable, that, for the same act, immunity should protect one

and not the other." *Buckley*, 509 U.S. at 273 (quotation omitted). As the petition pointed out (Pet. at 17), even though respondent and the postal inspectors acted in concert in retaliating against petitioner, under the decisions below the inspectors enjoy only a qualified immunity (which has been overcome) against petitioner's retaliatory prosecution claim.

4. Respondent fails to satisfy his burden of explaining why absolute immunity is necessary here. Indeed, respondent fails to offer any serious challenge to the petition's demonstration that, "even on purely policy grounds, the decision below is indefensible." Pet. at 23.

a. Respondent fails to show why qualified immunity provides insufficient protection against claims based upon investigatory misconduct. As the petition demonstrated (Pet. at 21), under the decisions of this Court, the presumption is that qualified immunity is sufficient to protect government officials in the exercise of their duties. *See, e.g.*, *Burns*, 500 U.S. at 486-87; *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Far from rebutting this presumption, the opposition simply ignores the question of qualified immunity altogether.

b. While respondent points to the discussion of policy considerations in *Imbler* and *Buckley* in asserting that absolute immunity is justified here, *see* Opp. at 10, he does not discuss, much less undermine, petitioner's demonstration that those policy considerations are inapplicable here. *See* Pet. at 22-23.

c. Respondent does not dispute that application of absolute immunity to claims based upon investigatory misconduct "encourages prosecutors to engage in dubious investigatory conduct" and may encourage prosecutors to try to "shield [themselves] from liability for any constitutional wrongs against innocent citizens by ensuring that they go to trial." Pet. at 23 (quotation omitted).

d. The one policy argument that respondent makes—that the retaliatory prosecution claim against him

places his decision to prosecute in issue (Opp. at 7-8)—is clearly without merit. The decision to prosecute is placed in issue by every malicious or retaliatory prosecution claim, whether or not a prosecutor is involved, because one defense to such a claim is that the plaintiff "would have been prosecuted even if the defendants had behaved properly." *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir. 1988); *accord* Pet. App. 12a. As a consequence, the fact that the retaliatory prosecution claim against respondent places the decision to prosecute in issue does not make this case one of those "exceptional situations where it is demonstrated that absolute immunity is essential to the public business." *Butz v. Economou*, 438 U.S. 478, 507 (1978).

Respondent further asserts that consideration of petitioner's claim "would devolve into a virtual retrial of the criminal offense in a new forum" and that fear of such claims would discourage prosecutors from issuing indictments in close cases. Opp. at 8 (quotation omitted). He does not, however, explain why this would be so—which is not surprising given that he does not dispute the petition's demonstration (Pet. at 22-23) that claims based upon such conduct are unlikely to be brought frequently, are not especially difficult to defend against, and are not intimately associated with the judicial process. Moreover, as this Court recognized in *Buckley*, the real danger is that affording absolute immunity in such cases will encourage prosecutors who have acted improperly in the investigatory phase of a case to go forward themselves with unfounded indictments against innocent citizens in order to insulate their investigative misconduct from any claims. *See Buckley*, 509 U.S. at 276.

C. Respondent's Remaining Arguments Are Clearly Meritless.

1. Respondent's carefully-phrased contention (Opp. at 6) that petitioner's retaliatory prosecution claim is "predicated" upon the decision to prosecute has no basis and makes no

sense. The claim at issue here is not based upon the filing of an indictment or any other conduct closely related with the judicial process. It is instead that respondent joined with the postal inspectors in a conspiracy to retaliate against petitioner for his exercise of his First Amendment rights and that as part of this conspiracy respondent, acting in concert with the postal inspectors, engaged in investigative misconduct, including, *inter alia*, coercing and intimidating witnesses into providing false and misleading grand jury testimony. Thus, petitioner's retaliatory prosecution claim is only "predicated" upon the decision to prosecute to the extent that the investigatory misconduct of respondent and the postal inspectors enabled that decision. Indeed, because the ultimate decision to prosecute is not one of the elements of a malicious or retaliatory prosecution claim, *see, e.g.*, *Restatement (Second) of Torts* § 653 (1977), petitioner can state a viable claim whether or not respondent made that decision. As one authority cited by respondent notes, however, "[i]t would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty." *Zahrey*, 221 F.3d at 353.

2. Respondent points out (Opp. at 8-9) that this Court's decision in *Buckley* did not decide whether a viable cause of action had been stated. While that is true, it does not help respondent. As the court of appeals concluded, petitioner has stated a valid claim for malicious prosecution against the Government. Pet. App. 8a-12a. As petitioner has also alleged that respondent acted with an unconstitutional motive, J.A. 83, leaving aside any immunity defenses petitioner has clearly stated a valid claim for retaliatory prosecution.

3. Finally, respondent is not helped by *Imbler*'s statement that a prosecutor's conduct "in initiating a prosecution and in presenting the [Government's] case" is absolutely immune

from liability. *Imbler*, 424 U.S. at 431. It would be perverse indeed to characterize respondent's investigative activity, i.e., coercion and intimidation of witnesses, as initiating a prosecution. *Imbler* clearly did not intend to extend the scope of absolute immunity so broadly. Quite the contrary, that decision refused to extend absolute prosecutorial immunity beyond conduct "intimately associated with the judicial phase of the criminal process." *Id.* at 430. Moreover, as the petition noted, in *Kalina* and other decisions "this Court has consistently refused to afford absolute immunity to non-advocatory functions performed by prosecutors simply because they are related to the prosecutor's advocatory functions." Pet. at 16.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for writ of certiorari should be granted, and the decision below summarily reversed.

Respectfully submitted,

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